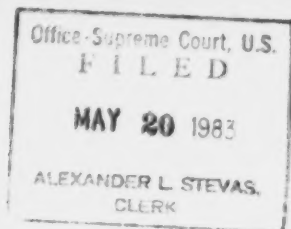

No. 82-1722



IN THE
Supreme Court of the United States

OCTOBER TERM 1982

COUNTY OF MONROE, *et al.*,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to
the Special Court, Regional Rail
Reorganization Act of 1973

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where §1152 of the Northeast Rail Service Act ("NERSA") expressly provides that the Special Court, Regional Rail Reorganization Act, "shall have original and exclusive jurisdiction over any civil action . . . for injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision of [NERSA]," may petitioners bypass the Special Court's exclusive jurisdiction by seeking injunctive relief in the District Court in a civil antitrust action, where the object of the relief is to prevent abandonment by Consolidated Rail Corporation ("Conrail") of rail lines as approved under NERSA?

2. When the Special Court did not stay petitioners' antitrust action in the District Court, but merely enjoined petitioners from pursuing injunctive relief in another forum that would prevent Conrail from dismantling its lines as authorized under NERSA, did not the Special Court properly act within its exclusive jurisdiction under §1152 of NERSA?

* In accordance with Rule 28.1, respondent states that, except wholly owned subsidiaries, it owns stock in the following affiliated companies: Akron & Barberton Belt Railroad Company, Albany Port Railroad Corporation, Belt Railway Company of Chicago, Calumet Western Railway Company, Canada Southern Railway Company, Chicago and Western Indiana Railway Company, Fruit Growers Express Company, Indiana Harbor Belt Railroad Company, Lakefront Dock and Railroad Terminal Company, Monongahela Railway Company, Nicholas, Fayette and Greenbrier Railroad Company, Peoria and Pekin Union Railway Company, Pittsburgh, Chartiers & Youghioghenny Railway Company, Terminal Railroad Association of St. Louis, Inc. and Toledo Terminal Railroad Company.

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STATEMENT

Petitioners County of Monroe, Pennsylvania, and its commissioners (herein "petitioners") ask this Court to grant certiorari to review and reverse an order of the Special Court, Regional Rail Reorganization Act of 1973. In that order, the Special Court invoked its exclusive jurisdiction under §1152 of the Northeast Rail Service Act of 1981 ("NERSA"), 45 U.S.C.A. §1105 (West Supp. 1983), and enjoined petitioners from seeking *in another forum* injunctive relief which would prevent respondent Consolidated Rail Corporation ("Conrail") from implementing a plan to dismantle three segments of track on its Scranton Line, which runs between Scranton, Pennsylvania and Port Morris, New Jersey (herein "Scranton Line segments").

The essential facts are undisputed.

The Scranton Line has not been used as a passenger line since before Conrail was created by Congress almost ten years ago (Resp. App. A-15, A-16).¹ For more than three years, no freight has moved over the segments in issue (Resp. App. A-15, A-16). Conrail, wishing to utilize the rails of the Scranton Line segments as replacements on other lines where they were needed (Pet. App. 15a), instituted abandonment procedures as specified in §308 of the Regional Rail Reorganization Act of 1973 ("3-R Act"), 45 U.S.C.A. §748 (West Supp. 1983).² In due course Conrail obtained the requisite ICC approvals (Resp. App. A-7 to A-9, A-12 to A-13; Pet. App. 15a-16a). Petitioners who participated in the proceedings before the ICC do not dispute that Conrail followed the abandonment procedures established by NERSA.³

1. Respondent's Appendix is referred to as "Resp. App." Petitioners' Appendix is referred to as "Pet. App."

2. Section 308 was added to the 3-R Act by §1156 of NERSA (Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35) when Congress, finding that the then existing statutory framework regulating railroads was not adequate to permit the survival and viability of Conrail, established new procedures to facilitate the abandonment of unprofitable lines owned by Conrail. Section 308 is reproduced in Respondent's Appendix at page A-1.

3. A challenge to procedures followed by Conrail under NERSA, as incorporated in the 3-R Act, was dropped by petitioners (Pet. App. 16a)

Petitioners had the opportunity to buy the Scranton Line segments during the entire period of disuse. Indeed, petitioners had the absolute right under §308(e) of the 3-R Act to buy these segments at 75% of their net liquidation value as established by the ICC pursuant to procedures set forth in §308(d) of the 3-R Act. Petitioners failed to do so within the statutory period of 120 days prescribed by §308(e) of the 3-R Act (Pet. App. 15a-17a, 60a). Rather, petitioners brought an action in the Middle District of Pennsylvania seeking to enjoin Conrail from proceeding with its abandonment (Pet. App. 1a-8a, 60a). In that action, petitioners asserted that they and others "desire to purchase" all of the Scranton Line segments and certain viable lines (Pet. App. 5a). Petitioners' position was that Conrail either should be enjoined from abandoning the line or should sell it to Monroe County and others — and that, in the event of abandonment without sale, then Conrail was engaged in an attempt to monopolize in violation of Section 2 of the Sherman Act (Pet. App. 6a-7a).

Conrail thereupon instituted this action before the Special Court to enjoin petitioners from pursuing any injunctive relief which sought to forestall Conrail's abandonment program in *any* forum other than the Special Court (Pet. App. 20a-21a).⁴ Conrail did not seek to enjoin the District Court for the Middle District of Pennsylvania;⁵ Conrail only sought to keep petitioners from requesting an injunction in any forum *other* than the Special Court (Pet. App. 20a-21a; Resp. App. A-15).

4. The jurisdiction of the Special Court on which the action was based is stated in §1152 of NERSA, 45 U.S.C.A. §1105 (West Supp. 1983), *inter alia*:

(a) Notwithstanding any other provision of law, the Special Court shall have original and exclusive jurisdiction over any civil action—

(1) For injunctive, declaratory or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this [subtitle], or administrative action taken thereunder to the extent such action is subject to judicial review;...

5. A temporary restraining order issued by the Middle District, pending the decision of the Special Court, has expired by its terms and has not been renewed (Pet. App. 61a). Respondent's subsequent agreement was to take no action to remove rails until the Special Court acted on its complaint.

The Special Court, after analyzing its jurisdiction and the form of relief sought by petitioners, issued a narrow ruling enjoining petitioners "from pursuing further injunctive relief" in the action they had filed in the Middle District of Pennsylvania (Pet. App. 63a). A motion to the Special Court for a stay was denied (Pet. App. 65a-66a). Petitioners then filed a stay application with Chief Justice Burger which application, presenting the same arguments made in their petition here, was denied on April 28, 1983 (No. A-844.)

ARGUMENT

I.

THE SPECIAL COURT PROPERLY ASSERTED ITS EXCLUSIVE JURISDICTION OVER ANY INJUNCTIVE RELIEF THAT WOULD HAVE PREVENTED ABANDONMENT OF RAIL LINES AS AUTHORIZED UNDER NERSA.

The ruling of the Special Court of which petitioners seek review involves a jurisdictional issue of restricted scope, applicable only to Conrail under NERSA, and with no general applicability to other areas of the law or even to abandonment proceedings of other railroads. It has no precedential value in any other context.

Within the narrow compass of its ruling, the Special Court was clearly correct. The relief sought by petitioners in the Middle District of Pennsylvania was to enjoin Conrail "from abandoning and liquidating" its Scranton Line, "or any segment thereof" (Pet. App. 70a). The Special Court found that such relief relates to the precise abandonment procedures authorized by Congress in NERSA (Pet. App. 63a). The Special Court thus concluded that the relief sought by petitioners "falls squarely" within the exclusive jurisdiction of the Special Court, as set forth in § 1152 of NERSA, 45 U.S.C.A. § 1105 (West Supp. 1983). *Id.* Accordingly, the Special Court enjoined petitioners from seeking such injunctive relief against Conrail in another forum.⁶

The Special Court's ruling is hardly open to dispute. The Congressional purpose for the Special Court's exercise of § 1152 jurisdiction is both recent and clear. Acting to prevent a collapse of the railroad system in the Northeastern United States, Congress enacted NERSA in 1981 and, by adding § 308 to the 3-R Act, 45 U.S.C.A. § 748, authorized Conrail to accomplish a far-reaching program of line abandonments without delay. The

6. The decision was issued by the Section 1152 Panel of the Special Court consisting of Presiding Judge Oliver Gasch, and Judges William B. Bryant and Charles R. Weiner (Pet. App. 56a-64a).

NERSA abandonment authorization was narrowly conceived, applying only to Conrail; and Conrail immediately began an abandonment program, because by § 1142 of NERSA Congress had imposed on Conrail a statutory imperative to establish its viability by 1983 or face its own liquidation. 3-R Act § 403, 45 U.S.C.A. § 763 (West Supp. 1983).

Section 1152 was essential to the fulfillment of the NERSA abandonment program, and in any event is not ambiguous, granting as it does to the Special Court exclusive jurisdiction over any court action "for injunctive, declaratory, or other relief relating to the enforcement, operation, execution or interpretation of any provision of or amendment made by this [subtitle], or administrative action taken thereunder...." The injunctive relief requested by petitioners in the District Court thus fits precisely within the specific and essential jurisdiction of the Special Court.

The Special Court's order is a narrow one. Nothing in the order precludes petitioners from pursuing their request for injunctive relief against Conrail *before the Special Court* itself — on whatever grounds petitioners choose to assert, whether those grounds be failed negotiations (Pet. App. 16a), attempts to monopolize (Pet. App. 7a), or some other theory. However, whatever theory petitioners may adopt in seeking to enjoin Conrail's abandonment program, they must assert it before the Special Court, and not before some other forum which petitioners may prefer. In short, petitioners are not entitled to their choice of forum when the relief they seek is to enjoin Conrail from abandonment of rail lines under NERSA, since that issue has been exclusively vested by Congress in the Special Court.

II.

PETITIONERS' GROUNDS FOR REVIEW OF THE SPECIAL COURT'S ORDER ARE NEITHER SIGNIFICANT NOR MERITORIOUS.

Petitioners assert four reasons which are claimed to justify a grant of certiorari. None is significant or meritorious:

A. The Claim That Petitioners Must Now Bifurcate Their Antitrust Relief.

Petitioners' claim that the Special Court has made them bifurcate their antitrust relief has a hollow ring in the face of the fact, obvious from the pleadings, that the antitrust complaint is a sham.

Conrail received approval from the ICC under NERSA to abandon specified unprofitable segments of the Scranton Line, while retaining those portions that were viable (Resp. App. A-4 to A-13; Pet. App. 14a-16a). The abandoned segments were redundant in that no shippers or receivers were located on them. The intervening segment of the line was determined by Conrail to be making a financial contribution to the system and was continued in service via a connection with another rail line (Pet. App. 17a). Petitioners concede in their petition (at page 7) that Conrail's designation of the out-of-service segments for abandonment "was actually part of a plan by Conrail to enhance other lines." As the Special Court recognized,

. . . Congress intended that the abbreviated abandonment procedure added to the 3R Act by NRSA would permit Conrail to expeditiously dispose of obsolete or unprofitable lines *in favor of service on the railroad lines with the best opportunity for growth and profitability.*

(Pet. App. 58a, emphasis added). Yet, the sole basis for petitioners' antitrust claim is that Conrail followed the abandonment procedure authorized by Congress to make Conrail economically viable. There can be no possible attempt to monopolize in carrying out the process specifically designed for Conrail by

NERSA.⁷ Thus, the antitrust allegations are a sham designed to maintain the case in the Middle District of Pennsylvania, and to avoid the jurisdiction of the Special Court.

Even apart from the sham nature of their antitrust complaint, petitioners' claim that the order of the Special Court improperly requires them to split their request for injunctive relief and their claim for "such other and further relief as the court deems proper and just" between the Special Court and the District Court is without merit, since that argument is only a rephrasing of the argument, disposed of above, that they have the right to seek injunctive relief in the District Court. But that is precisely what Congress in NERSA said they cannot do when the relief affects Conrail's abandonment program under that Act.

In enacting NERSA, Congress intended to expedite those processes, including abandonments of unprofitable rail lines, which would allow Conrail to operate a self-sustaining railroad

7. Even a brief examination of petitioners' amended complaint before the District Court on the antitrust count (Pet. App. 1a-8a) will reveal that there is no colorable basis for the claim that Conrail's abandonment of these rail segments is an attempt to monopolize in violation of Section 2 of the Sherman Act. The only paragraphs of the complaint (¶¶ 17-22) describing alleged violative acts reveal their sham nature: Paragraph 17 of the amended complaint refers to the liquidation prices; the liquidation prices of the segments were established by the ICC under §308 of the 3-R Act, not by Conrail (Resp. App. A-9, A-12, A-13). Paragraphs 18-20 allege the abandonments of the segments were on differing schedules, but the record before the Special Court shows this to be the result of petitioners having made offers to purchase two of the segments in Pennsylvania (Resp. App. A-10). Finally, in paragraphs 20-21, petitioners allege that "they and others" desire to purchase the Scranton Line segments and have been denied the opportunity to do so. However, the undisputed record establishes that the statutory offers to purchase the two Pennsylvania segments were withdrawn by petitioners on June 17, 1982 (Resp. App. A-10).

On their face, the above allegations do not constitute any attempt to monopolize, and there are no other allegations on that subject. Indeed, counsel for petitioners conceded in the Special Court that they "were perfectly happy to have Conrail provide that service," which is hardly a complaint about an alleged monopolist (Resp. App. A-17).

system in the Northeast. NERSA §1132, 45 U.S.C.A. §1101 (West Supp. 1983). In NERSA, Congress expressly required that all requests for relief affecting the operation of NERSA rest with the Special Court, thereby seeking to assure speedy accomplishment of the purposes of NERSA, as well as consistency of its application. As this Court has acknowledged in another context, reference of certain questions to a court having specialized expertise saves judicial time and resources, *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), and, of course, prevents potential conflicting decisions.

Moreover, contrary to petitioners' assertion, the Special Court was careful to state that it was "not attempting to stay the district court in the proper exercise of its jurisdiction" (Pet. App. 63a). Section 1152 explicitly grants exclusive jurisdiction to the Special Court "over any civil action . . . for injunctive . . . relief relating to the . . . operation [of NERSA] or administrative action taken thereunder. . . ." The injunctive relief sought by petitioners unquestionably lies within the statutory bounds. Yet, as the Special Court recognized, "implicit in the grant of original and exclusive jurisdiction to the Special Court under NERSA is the intention that it not consider every issue which might tangentially touch the provisions of NERSA" (Pet. App. 62a). The Special Court was scrupulous to assert its exclusive jurisdiction only over that aspect of petitioners' claim for injunctive relief that has an impact on the implementation of §308.⁸

In their action in the District Court, petitioners also seek "other relief" and it is clear from their own petition that, even if

8. Courts have found that an antitrust plaintiff will not be prejudiced if compelled to establish its right to damages in a separate phase of the case. *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975); *LoCicero v. Humble Oil & Refining Co.*, 52 F.R.D. 28 (E.D. La. 1971). In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, rehearing denied, 423 U.S. 886 (1975), the issue of damages was ordered to be determined in a separate trial from the grant of injunctive relief. Manifestly, the ruling by the Special Court that injunctive relief—which is not a jury matter—against Conrail's NERSA-approved abandonments must be sought before the Special Court and not before the court which has jurisdiction over other liability and damages aspects of the antitrust claim is unexceptional, and does not require reversal.

there is found to be any antitrust liability, what is involved is no more than a question of money. At page 12 of their petition, petitioners set forth the exact damages per mile of track they claim they would suffer if the line were dismantled. Thus, if the rails are removed by Conrail in its efforts to rehabilitate other lines, and that removal is adjudged to be wrongful, the Scranton Line may be restored by replacing the rails and the cost of replacement can be determined as a liquidated sum. Even the cost of renewing easements or taking by eminent domain land which might be subject to reversionary interests has a monetary cost which can be calculated. Thus, to the extent that such relief may not be available in the Special Court, petitioners have a full and adequate remedy in damages in the District Court for any alleged antitrust violation.

B. The Claim That the District Court Had Assumed Jurisdiction of the Requested Relief.

Petitioners' claim that the District Court had assumed jurisdiction over the request for injunctive relief is at odds with the District Court's own statement that it did *not* address the jurisdiction issue, Chief Judge Nealon specifically recognizing that this issue was being decided by the Special Court (Pet. App. 32a n.1).⁹ The entry of a temporary restraining order, limited to a ten-day period, was not an assertion by the District Court of any right to award injunctive relief on either a preliminary or permanent basis.¹⁰ The order of the Special Court granting Conrail's request for declaratory judgment is thus not in conflict with any

9. The Special Court has made it clear that it should have the opportunity to decide the question of its exclusive jurisdiction prior to an adjudication of the jurisdiction issue in any other forum. See *Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941, 950 (Sp. Ct., 3-R Act 1976), *cert. denied*, 429 U.S. 1095 (1977).

10. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), cited by petitioners, is inapposite because that case did not involve a conflict of federal exclusive jurisdiction, but rather the jurisdiction of a state court over a simple contract action to recover payments made in excess of those stipulated by contracts governed by state law. Here petitioners assert a claim under federal law and request injunctive relief as to which Congress has declared the Special Court to have exclusive jurisdiction.

action of the District Court, or with any decision of any other court.

C. The Claim That the Special Court Lacks Power to Enjoin Proceedings in the District Court.

Petitioners' assertion that the Special Court lacks power under NERSA to enjoin or stay proceedings in a federal district court is irrelevant since the Special Court did *not* enjoin the District Court, but only petitioners, and even then only enjoined petitioners from pursuing injunctive relief in the District Court (Pet. App. 63a). In any event, petitioners have misread the applicability of §209 of the 3-R Act, 45 U.S.C. §719(g), to the Special Court's powers under §1152 of NERSA. The abandonment provisions in §308 are part of the 3-R Act, referred to as "this Act" in §209(g). Therefore, even as petitioners apparently concede at page 23 of their petition, the injunctive and stay powers granted to the Special Court by §209(g) would support a Special Court stay of proceedings before the District Court.

Nevertheless, there was no need to reach this issue in the Special Court. That Court enjoined *petitioners* from pursuing the requested injunctive relief in the Middle District of Pennsylvania, but it did not attempt to stay the District Court (Pet. App. 63a). *Cf. Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941 (Sp. Ct., 3-R Act 1976), *cert. denied*, 429 U.S. 1095 (1977) (The Special Court asserted its jurisdiction under the 3-R Act and declared void an order of a district court).

D. The Claim That Petitioners Were Denied the Right to Plead or Present Evidence.

Finally, petitioners claim that they were deprived of the right to an evidentiary hearing and the right to file responsive pleadings. This claim is patently frivolous. Petitioners filed objections to Conrail's complaint in the Special Court and also filed a motion to dismiss Conrail's complaint (Petition, p. 6). Petitioners obviously had ample opportunity to, and did, file responsive pleadings with the Special Court.

Also, petitioners were not deprived of an opportunity to present any relevant evidence to the Special Court. Conrail invoked the Special Court's jurisdiction to decide a legal issue by way of a motion for declaratory judgment under Rule 57, Federal Rules of Civil Procedure, and 28 U.S.C. §2201, and for injunctive relief under Rule 65, Federal Rules of Civil Procedure. Extensive argument on that legal issue was held before the Special Court. The Special Court had before it the pleadings in the District Court and the undisputed notices, decisions and orders of the ICC authorizing abandonment of portions of Conrail's Scranton Line (Resp. App. A-16, A-19 to A-21). No other evidence of any kind would have been relevant to the legal issue or would have warranted a different determination. An order granting a declaratory judgment and permanent injunctive relief was appropriate to settle the controversy as to jurisdiction. Clearly, no rights of petitioners to plead or to be heard were violated.

CONCLUSION

The Special Court's ruling is narrowly framed, involving only its jurisdiction over one form of relief sought in a particular NERSA-related claim brought against Conrail. The Special Court is developing its jurisdiction and the ruling here is not in conflict with any decision by any other court.¹¹ Moreover, that ruling concerns only the jurisdiction of the Special Court in matters relating to NERSA abandonments by Conrail. Obviously, no special and important reason for a grant of certiorari is present here.

11. This is the first case in which the Special Court has examined the scope of its jurisdiction under §1152, enacted in 1981. There are two other cases pending before the Special Court presenting challenges to the jurisdiction of that Court under §1152: *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, Special Court, 3-R Act, No. C.A. 83-6 (involving jurisdiction of state public utility commissions over rail abandonments), and *Consolidated Rail Corp. v. Schumm*, Special Court, 3-R Act, No. C.A. 83-8 (involving jurisdiction of state courts to interfere with NERSA-approved abandonments). The Special Court is only beginning the process of defining its jurisdiction under §1152, and it should be allowed to develop its jurisprudence before this Court reviews that question.

For the above reasons, we respectfully urge that the petition for a writ of certiorari to the Special Court should be denied.

Respectfully submitted,

/s/

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Dated: May 19, 1983.

RESPONDENT'S APPENDIX

§ 308 of the 3-R Act as added by § 1156 of NERSA, Subtitle E, Omnibus Budget Reconciliation Act, P.L. 97-35 (August 13, 1981), codified at 45 U.S.C.A. § 748 (West Supp. 1983)

ABANDONMENTS

SEC. 1156. (a) Title III of the Regional Rail Reorganization Act of 1973 is amended by adding at the end thereof the following new section:

ABANDONMENTS

"SEC. 308. (a) GENERAL.—The Corporation may, in accordance with this section, file with the Commission an application for a certificate of abandonment for any line which is part of the system of the Corporation. Any such application shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of title 49, United States Code.

"(b) APPLICATIONS FOR ABANDONMENT.—Any application for abandonment that is filed by the Corporation under this section before December 1, 1981, shall be granted by the Commission within 90 days after the date such application is filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to the line to be abandoned.

"(c) NOTICE OF INSUFFICIENT REVENUES.—(1) The Corporation may, prior to November 1, 1983, file with the Commission a notice of insufficient revenues for any line which is part of the system of the Corporation.

"(2) At any time after the 90-day period beginning with the filing of a notice of insufficient revenues for a line, the Corporation may file an application for abandonment for such line. An application for abandonment that is filed by the Corporation under this subsection for a line for which a notice of insufficient revenues was filed under paragraph (1) shall be granted by the Commission within 90 days after the date of such application is

filed unless, within such 90-day period, an offer of financial assistance is made in accordance with subsection (d) of this section with respect to such line.

“(d) OFFERS OF FINANCIAL ASSISTANCE.—The provisions of section 10905 (d)-(f) of title 49, United States Code (including the timing requirements of subsection (d) thereof), shall apply to any offer of financial assistance under subsection (b) or (c) of this section. [See pages A-4 to A-6, *infra*.]

“(2) The Corporation shall provide any person that intends to make an offer of financial assistance under subsection (b) or (c) of this section with such information as the Commission may require.

“LIQUIDATION.—(1) If any application for abandonment is granted under subsection (b) of this section, the Commission shall, as soon as practicable, appraise the net liquidation value of the line to be abandoned, and shall publish notice of such appraisal in the Federal Register.

“(2) Appraisals made under paragraph (1) shall not be appealable.

“(3)(A) If, within 120 days after the date on which an appraisal is published in the Federal Register under paragraph (1), the Corporation receives a bona fide offer for the sale, for 75 percent of the amount at which the liquidation value of such line was appraised by the Commission, of the line to be abandoned, the Corporation shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

“(B) If the Corporation receives no bona fide offer under subparagraph (A), within such 120-day period, the Corporation may abandon or dispose of the line as it chooses, except that the Corporation may not dismantle bridges, or other structures (not including rail, signals, and other rail facilities) for 120 days thereafter. The Secretary may require that bridges or other structures (not including rail, signals, and other rail facilities), not be dismantled for an additional 8 months if he assumes all liability of any sort related to such property.

"(4) If the purchaser under paragraph (3) (A) of this subsection of any line of the Corporation abandons such line within five years after such purchase, the proceeds of any track liquidations shall be paid into the general fund of the Treasury of the United States.

"(f) EMPLOYEE PROTECTION.—The provisions of section 10903(b) (2) of title 49, United States Code, shall not apply to any abandonment granted under this section. Any employee who was protected by the compensatory provisions of title V of this Act immediately prior to the effective date of the Northeast Rail Service Act of 1981, who is deprived of employment by such an abandonment shall be eligible for employee protection under section 701 of this Act".

(b) The table of contents of the Regional Rail Reorganization Act of 1973, as amended by this subtitle, is further amended by inserting immediately after the item relating to section 307 the following new item:

"Sec. 308. Abandonments."

**Excerpts from 49 U.S.C.A. § 10905 (West Supp. 1983)
(incorporated by reference in § 308 of 3-R Act, 45 U.S.C.A.
§ 748) (West Supp. 1983)**

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the condi-

tions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and

amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION

Docket No. AB-167 (Sub-No. 280N)

**CONRAIL ABANDONMENT BETWEEN PORT MORRIS
JCT AND STATE LINE, NJ**
Decided: February 24, 1982

On November 30, 1981, Consolidated Rail Corporation (Conrail) filed an application pursuant to section 308 of the Regional Rail Reorganization Act of 1973¹ to abandon 27.5 miles of its rail line between Port Morris Jct (milepost 45.7) and State Line (milepost 73.2) in Morris, Warren and Sussex Counties, NJ.

Under section 308(b) the Commission must grant any application for abandonment filed by Conrail before December 1, 1981, within 90 days after the date such application is filed unless an offer of financial assistance is made pursuant to section 308(d) during that 90-day period. Because no offer of financial assistance has been received, the application is granted.

Congress has directed the Commission to appraise the net liquidation value of each Conrail line being abandoned. Under Section 308(e) any interested party would be able to purchase such a line at 75 percent of the value set by the Commission.

With its application Conrail submitted a statement that its estimate of the line's net liquidation value is \$1,717,250.

The Commission intends to adopt this estimate unless, within 15 days from date of service of this order, an interested party requests that the Commission independently appraise the line. If such a request is made, the Commission will, as soon as practicable, set a value for the line based on any information available. That determination will be published in the *Federal Register* and is not appealable. If no request is made the Commission will publish Conrail's estimate in the *Federal Register*.

1. This section was added by the Northeast Rail Service Act of 1981. Pub. L. 97-35.

A-8

If any interested parties have pertinent data on the net liquidation value of this line, they should submit it to the Commission's Section of Finance, Room 5414, 12th and Constitution Ave., N.W., Washington, DC 20423.

It is certified: Conrail is authorized to abandon the line described above.

It is ordered:

The certificate and decision are effective upon service.

By the Commission, Review Board Number 2, Members Carleton, Fisher and Williams.

Agatha L. Mergenovich
Secretary

(SEAL)

EXHIBIT A

Federal Register/Vol. 47, No. 146/Thursday,
July 29, 1982/Notices

* * *

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-167 (Sub-No. 280N)]

**Conrail Abandonment Between Port Morris Jct
and State Line, NJ; Notice of Findings**

Notice is hereby given pursuant to section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 2 has issued a certificate authorizing the Consolidated Rail Corporation to abandon its rail line between Port Morris Jct and State Line in the Counties of Morris, Warren, and Sussex, NJ, a total distance of 27.5 miles effective on March 11, 1982.

The net liquidation value of the line is \$2,210,601. If, within 120 days from the date of this publication, Conrail receives a bona fide offer for the sale, for 75 percent of the net liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich
Secretary

[FR Doc. 82-20492 Filed 7-28-82 8:45 a.m.]

* * *

EXHIBIT B

A-10

WITKOWSKI, WEINER, McCAFFREY AND BRODSKY, P.C.

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*ADMITTED IN CA. ONLY

June 17, 1982

Section of Finance

Interstate Commerce Commission

Room 5420

12th Street & Constitution Avenue, N.W.

Washington, D.C. 20423

Re: Docket No. AB-167 (Sub-No. 281 N) and
Docket AB-167 (Sub-No. 287 N)

Dear Sirs:

On June 7, 1982, the Interstate Commerce Commission served a supplemental decision establishing the sale terms in the above-referenced dockets. The Commission's order established June 17, 1982, as the deadline for a statement of intent to purchase the lines at the specified terms.

Pocono Northeast Railway, Inc. (PNR) and the Monroe County Rail Authority have determined the Commission's sale terms to be unacceptable and hereby withdraw their offers of financial assistance. PNR and Monroe County intend to pursue acquisition of these lines pursuant to the discount purchase pro-

visions established by section 1156 of the Northeast Rail Service Act of 1981.

Respectfully submitted,
POCONO NORTHEAST RAILWAY, INC.
MONROE COUNTY RAIL AUTHORITY
by their special counsel
Witkowski, Weiner, McCaffrey
and Brodsky, P.C.
Suite 350
1575 Eye Street, N.W.
Washington, D.C. 20005

/s/ Peter A. Gilbertson

Peter A. Gilbertson

Federal Register/Vol. 47, No. 207/Tuesday,
October 26, 1982/Notices

* * *

[Docket No. AB-167 (Sub No. 287N)]

Rail Carriers; Conrail Abandonment Between
State Line and W. Slateford, PA; Findings

Notice is hereby given pursuant to Section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 3 has issued a certificate authorizing the Consolidated Rail Corporation to abandon its rail line between the NJ-PA State line, milepost 73.2 and W. Slateford, milepost 75.1 in the County of Northampton, PA, a total distance of 1.9 miles effective on July 7, 1982.

The net liquidation value of this line is \$119,303. If, within 120 days from the date of this publication, Conrail receives a bona fide offer for the sale, for 75 percent of the liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich,
Secretary.

[FR Doc. 82-29302 Filed 10-25-82 8:45 a.m.]

* * *

Federal Register/Vol. 47, No. 210/Friday,
October 29, 1982/Notices

* * *

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-167 (Sub-No. 281N)]

**Conrail Abandonment Between West Gravel Place and Mount
Pocono, Pa.; Notice of Findings**

Notice is hereby given pursuant to Section 308(e) of the Regional Rail Reorganization Act of 1973 that the Commission, Review Board Number 3 has issued a certificate and decision authorizing the Consolidated Rail Corporation to abandon its rail line between West Gravel Place, milepost 84.6 and Mount Pocono, milepost 100.4 in the County of Monroe, Pa, a total distance of 15.8 miles effective on July 7, 1982.

The net liquidation value of this line is \$1,691,974. If, within 120 days from the date of this publication, Conrail received a bona fide offer for the sale, for 75 percent of the net liquidation value, of this line it shall sell such line and the Commission shall, unless the parties otherwise agree, establish an equitable division of joint rates for through routes over such lines.

Agatha L. Mergenovich
Secretary

[FR Doc. 82-29757 Filed 10-28-82, 8:45 a.m.]

* * *

EXHIBIT E

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

| | | |
|--|---|-----------------|
| Consolidated Rail Corporation, | : | |
| | : | |
| <i>Plaintiff,</i> | : | |
| | : | |
| <i>v.</i> | : | Sec. 1152 Panel |
| | : | C.A. No. 83-01 |
| County of Monroe; Nancy Shukaitas, | : | |
| Chairman, Monroe County Board of | : | |
| Commissioners, individually and in | : | |
| her official capacity; Jesse D. Pierson, | : | |
| Member, Monroe County Board | : | |
| of Commissioners, individually and | : | |
| in his official capacity; and | : | |
| Thomas R. Joyce, Member, Monroe County | : | |
| Board of Commissioners, individually | : | |
| and in his official capacity, | : | |
| <i>Defendants.</i> | : | |

Courtroom No. 21
United States Court House
Third and Constitution Ave., N.W.
Washington, D.C. 20001
March 11, 1983

The above matter came on before the Honorable Oliver Gasch, United States District Court Judge (presiding), The Honorable William B. Bryant, United States District Court Judge, and The Honorable Charles R. Weiner, United States District Court Judge, for oral argument on plaintiff's motion for a preliminary injunction and declaratory judgment, at 9:30 A.M.

* * *

[8] [Mr. Shestack:] Just a microcosm of many cases — unviable because Conrail can't dispose of its unprofitable lines and face a deadline on July 1st where it is nonviable and there

has to be a liquidation. After all, Conrail is not owned by private parties. It is owned by the United States Government at this point. And it is under a direction by the United States Government to make it viable.

And the NERSA Act which provided this procedure in 1981 was because Congress realized that their whole system was at stake. Your honors will recall that Conrail was created to take over six bankrupt railways because the whole railway system in the northeast part of the United States was in jeopardy. And they took it over. And they couldn't make it viable. There were still huge deficits which were being supplied by the United States Government, and part of the viability was to abandon these lines.

So what Conrail did is it surveyed 17,000 miles of line; it came up with 2,000 miles that were to be viable; it was going to save a lot of money by doing it. It went to Congress; it published a plan. At that time it was under a moratorium not to abandon anything. Congress then enacted NERSA, giving this court extraordinary jurisdiction, greater jurisdiction that it had before, and provided this speedy procedure.

Monroe County knew all of that. It had years to [9] negotiate. These three segments, your Honor, have not had freight run on them for three years, not had passengers run on them for ten years. There was plenty of opportunity for the county to buy this line, to do what they wanted with it, or to follow the I.C.C. procedure where you can buy it at net liquidation value.

Judge Weiner: Your position is that if they want to go ahead with their antitrust action, you have no objection to that, as long as that doesn't speak to preventing you from abandoning the lines that are there now.

Mr. Shestack: That's right, your Honor.

Judge Weiner: In other words, you are prepared to defend the antitrust action as such, if it is truly an antitrust action.

Mr. Shestack: That's correct, your Honor.

Judge Weiner: But you don't want any interference with your abandonment.

Mr. Shestack: That is it precisely, your Honor. And this Court has the exclusive jurisdiction to decide that.

Judge Bryant: That is their prayer for relief in the Pennsylvania Court: To enjoin abandonment.

Mr. Shestack: That is exactly it, your Honor. I will read it to you.

Judge Bryant: I read it.

Judge Weiner: We have read it.

* * *

[12] [Mr. Shestack:] few other cases sent it back.

Now, I would like to address just one other matter. Monroe County says in this complaint they want to purchase this. Now, first of all, your Honor, it sounds reasonable, right? If a county wants to purchase this line, why shouldn't they really be able to purchase this line? Well, one might say here's a line that has not had passenger service for ten years, not had freight service for three years. There are plenty of opportunities under the law. There is about three or four different ways that you can purchase a railroad. You can even condemn it yourself, if you are a county. They didn't do any of that. Then NERSA sets up a procedure which allows you to purchase it for 75 percent. They didn't do that.

Yesterday we get a dramatic letter — I am sure you are going to hear about it — from Mr. Heffner from Monroe County, says, "We are ready to purchase it." And at what price are they ready to purchase it? At 30 percent of the net liquidated value established by the I.C.C., which is an unappealable value. Before the I.C.C., Monroe County submitted their appraisals of what they thought it was worth. So did Conrail submit its appraisals of what it thought it was worth. And the I.C.C. wrote — and your honors have the documents — a ten-page opinion the

first time, and then they have further arguments from Monroe County, so another ten-page opinion. You might even say — and we haven't bothered to argue it, but [13] it is true that when they argued all this before the I.C.C., they are bound by principles of res judicata or collateral estoppel, and they can't go into the liquidation again. But you don't even have to use that, because Congress specifically says that the liquidation value set is non-appealable.

And one of the prices Conrail has to pay is after the I.C.C. sets the liquidation value, you can buy it at a 75 percent discount. And what is it a discount of? Not even the going market value of that segment, but just the liquidation value, the net liquidation value, which is a knocked-down price. And what do they come in with with their letter yesterday which was sent to us? At 30 percent of the net liquidation value. And then they have a bunch of conditions on it.

One of the conditions is that they have to get the money from the federal government. And a congressman told them they might get the money from the federal government. Well, it is a long way between asking the federal government for getting money these days and getting the money.

And then the other aspect is to the extent they don't get the money from the federal government, another condition is that they get the money from the bank at prevailing interest rates, which is another big "if".

Then they put on conditions; they want trackage

* * *

[23] [Mr. Heffner:] some other railroad. We were perfectly happy to have Conrail provide that service. And Conrail was the one who walked away. They abandoned us; we didn't abandon them. And thus far, those efforts have been unsuccessful.

We have tried to go to other railroads and say, "If Conrail won't provide the service, will you provide it?" And they have said, "Yes, but, we will do it if we can get the entire line as a

package all the way from Scranton into the New York city area." They other railroads would say, "there is nothing we can do with it," a ten-mile or fifteen-mile piece with no on-line industry. But Monroe County realized that it had to do something, so on March 8th, as kind of a last-ditch effort, we made another offer to buy these lines, to buy the three segments, if worse came to worse, with intervening trackage rights, and, if possible, to buy the entire piece from Scranton to Port Norris, where New Jersey's DOT ownership begins.

Monroe County's position can be summed up briefly in four points.

There is no basis for this court to entertain Conrail's action under Section 209(g) of the RRR Act or Seciton 1152 of NERSA.

Two, Monroe County is not trying to challenge the I.C.C. abandonment orders through court proceedings.

Three, neither NERSA nor the RRR Act preclude —

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